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No. 92-433

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SEARS, ROEBUCK & COMPANY,
Petitioner,

v.

LOUIS J. BARATTINI, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

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The district court correctly found that respondent's counsel perpetrated an outrageous fraud on the court for the sole purpose of depriving it of jurisdiction. The court of appeals did not dispute that finding, and notwithstanding respondent's counsel's post hoc rationalizations, there is no doubt that respondent acted in absolute bad faith.[1] Thus, this case presents as starkly as

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[1] The district court's finding was based on a series of events, most of which respondent simply chooses to ignore in his opposition. For instance, he makes no mention of the fact that *his* law firm also represented Soileau or that in more than two years no action was

possible the issue of whether it is ever permissible to look beyond the pleadings when considering whether the joinder of an in-state defendant should be permitted.

In the petition, Sears demonstrated that this Court held in a series of older decisions that such an inquiry is permissible. It also demonstrated that the Third and Tenth Circuits unquestionably have gone beyond the pleadings and considered facts specific to the litigants (other than residence) in refusing to allow a joinder for the sole purpose of destroying diversity.

To be sure, the Fifth Circuit's holding in this case is not unique. Respondent rightly demonstrates that a substantial number of lower federal courts follow the same wooden approach adopted below. And petitioner concedes that there is some language in opinions of this Court (none of which was necessary to a decision) that supports the decision below. But all that shows is that the issue is a recurring one. Respondent's argument does not eliminate the inconsistent language in this Court's opinions and it does not eliminate the conflict between the Tenth and Third Circuits and the Fifth Circuit. At bottom, the opposition essentially proves the correctness of the petition's claim that this case warrants review.

Respondent makes a number of disparate arguments that are aimed at persuading the Court to deny review. These arguments warrant a brief reply.

1. Respondent first asserts that the plain language of 28 U.S.C. § 1446(b) categorically precludes asserting fraudulent joinder more than one year after remand. Opp. 6-8. The argument is unavailing for at least two reasons: First, respondent ignores the threshold lan-

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ever taken against Soileau during proceedings before the state court. Those facts, coupled with Soileau's statement that he was assured that no effort would be made to obtain a judgment or collect a judgment, completely undermine respondent's thirteenth-hour claim of innocence. *See* Pet. 5-6.

guage of § 1446(b) providing for a right of removal where "none of the parties in interest *properly joined* and served as defendants is a citizen of the State in which such action is brought." See Brief Of Lawyers For Civil Justice As *Amicus Curiae* In Support Of Petitioner, at 8 (quoting 28 U.S.C. § 1441(b)). Thus, § 1446(b) on its face envisions the exception argued for by petitioner. Second, even if the one-year bar were more categorical than it is, the argument fails to account for the well-established doctrine that "fraud" always stands as an exception to all procedural rules.[2] See Pet. 12 n.5 (citing *Morris* v. *Gilmer*, 129 U.S. 315, 329 (1889); *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176, 182-83 (1907)). Indeed, respondent's attempt to analogize § 1446(b) to a statute of limitations (Opp. 7) does him far more harm than good. In *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), this Court found "[d]eeply rooted in our jurisprudence" the principle that no party "may take advantage of his own wrong," which "has frequently been employed to bar inequitable reliance on *statutes of limitations*." *Id.* at 232-33 (emphasis added). See also *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396-97 (1946) (the doctrine that "[e]quity will not lend itself to . . . fraud . . . is read into every federal statute of limitations").[3]

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[2] Respondent's argument (Opp. 15) that the district court's initial decision to permit respondent to amend his complaint to add the nondiverse defendant, Eric Soileau, is res judicata fails for this same reason. Moreover, contrary to respondent's claim, there is no evidence in the record that the district court found this to be a "proper joinder." When initially allowing respondent to amend, the district court gravely warned respondent against a joinder for the purpose of defeating the jurisdiction of the court. *See* 6/29/88 Hearing Transcript, at 19 ("[Y]ou would not do this just to divest the Federal Court of jurisdiction, because then I would slap you with sanctions").

[3] Even *final judgments* must be set aside if a district court finds fraud, because " 'a decision produced by fraud on the court is not

2. Respondent attempts to distinguish factually the cases upon which petitioner relies. Opp. 17-24. This effort fails. In each of the cases cited by petitioner, this Court and the various courts of appeal announce a standard that allows a district court to consider a plaintiff's bad faith in joining a diversity-destroying defendant for the sole purpose of defeating the statutory right of removal. For example, in *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92 (1921), the Court *held* that whether "the local law makes for or against a joint liability" the joinder was fraudulent because it was "without any reasonable basis in fact and without any purpose to prosecute the cause in good faith against the [resident defendant]." *Id.* at 98-99.

Respondent places much reliance upon the conjunctive clause "without any basis in fact," but it is clear from these cases that this phrase does *not* mean that a defendant seeking removal must show that a plaintiff has falsely pleaded jurisdictional facts or that the plaintiff had no plausible cause of action whatsoever against the resident defendant. Instead, these cases emphasize that the "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having *no real connection with the controversy.*" *Id.* at 97 (emphasis added); *Chesapeake & Ohio Ry.* v. *Cockrell*, 232 U.S. 146, 152 (1914) (identical language). In addition, as Justice Holmes explained in *Illinois Central R.R.* v. *Sheegog*, 215 U.S. 308 (1909), a plaintiff may "sue the tort-feasors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, *without other ground for the charge than that its only purpose was to prevent removal*, would be bad on its face." *Id.* at 316 (emphasis added). Here, however, the district

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in essence a decision at all and never becomes final.'" 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2870, p. 248 (1973) (quoting *Kenner* v. *Commissioner*, 387 F.2d 689, 691 (7th Cir.), *cert. denied*, 393 U.S. 841 (1968)) (hereafter "Wright & Miller").

court's factual findings amply demonstrate that Soileau had "no real connection" to this controversy and that respondent's only purpose for joinder was to defeat federal jurisdiction.

Similarly, in *Abels* v. *State Farm Fire & Casualty Co.*, 770 F.2d 26 (3d Cir. 1985), the Third Circuit observed that "[c]ourts have found joinder to be fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, *or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.*" *Id.* at 32 (quoting *Goldberg* v. *CPC Int'l, Inc.*, 495 F. Supp. 233, 239 (N.D. Cal. 1980)) (emphasis added). Despite respondent's attempts to distinguish this case as one involving "Doe" defendants (Opp. 21), the *Abels* court found that the Doe defendants were sufficiently identified, 770 F.2d at 31, and the case upon which the *Abels* court relied made a similar finding. See *Goldberg* v. *CPC Int'l, Inc.*, 495 F. Supp. 233, 238-39 (N.D. Cal. 1980).[4]

In conceding that a district court may "pierce the pleadings" to determine whether a joinder is fraudulent (Opp. 19), respondent also concedes the relevance of both of the Tenth Circuit cases relied upon in the petition. Those cases stand for the proposition that "federal courts may look beyond the pleadings to determine if the joinder, *although fair on its face*, is a sham or fraudulent device to prevent removal." *Smoot* v. *Chicago, R.I. & Pac. Ry.*, 378 F.2d 879, 882 (10th Cir. 1967) (citing *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92 (1921)) (emphasis added); *Dodd* v. *Fawcett Publications, Inc.*, 329

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[4] Moreover, *Goldberg* cites *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92, 98 (1921) and *Chicago, R.I. & Pac. Ry.* v. *Schwyhart*, 227 U.S. 184, 194 (1913), as the lead cases supporting its fraudulent joinder standard, which the Third Circuit adopted in *Abels* and reiterated in *Boyer* v. *Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 959 (1991).

F.2d 82, 85 (10th Cir. 1964) ("the court may pierce the pleadings, . . . consider the entire record, and determine the basis of joinder by any means available . . .") (internal citations omitted). The Fifth Circuit, however, would only "pierce the pleadings" to examine whether a plaintiff can possibly recover from the resident defendant. Pet. 8a. In sum, this is a conflict among the circuits that requires resolution by this Court.[5]

3. Respondent's final argument is that the practical effect of overturning the Fifth Circuit's overly narrow fraudulent joinder standards would be a "proliferation of district court hearings on the motives and intentions of plaintiffs." Opp. 26. But, as respondent admits, district courts already "pierce the pleadings" to determine whether a diversity-destroying defendant was fraudulently joined. Opp. 19. There is no reason to think that a district court's inquiry into whether jurisdictional facts were falsely pleaded—or whether "consider[ing] the entire record," *Dodd*, 329 F.2d at 85, a cause of action has in fact been stated—would be any less time consuming or more "objective" an inquiry into whether the plaintiff's *sole* purpose is to defeat the defendant's statutory right of removal. This is especially true when, as the petition observes, the defendant seeking removal is under a "heavy burden" to show such bad faith by clear and convincing

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[5] Respondent also relies heavily upon language from cases and treatises which state that, in determining fraudulent joinder, the motive of the plaintiff is irrelevant. Respondent draws from this language his conclusion that "the motives of the plaintiff in joining a party are absolutely irrelevant." Opp. 11. But as the petition shows, such an "absolute" conclusion is invalid because it ignores the inevitable and critical proviso, *e.g.* 14A Wright & Miller § 3723, pp. 343-47 ("it is immaterial that the joinder of a particular party . . . is intended to defeat federal jurisdiction, *so long as it is not merely colorable or made in bad faith*") (emphasis added); *Illinois Cent. R.R.* v. *Sheegog*, 215 U.S. 308, 316 (1909) (whatever plaintiff's motive, "an allegation that the joinder of one of the defendants was fraudulent, *without other ground for the charge than that its only purpose was to prevent removal*, would be bad on its face").

evidence. See Pet. 13 n.6. In any event, if the burden of reopening a law suit even years after litigation has been concluded is justified where there is fraud on the court (see Fed. R. Civ. P. 60(b)), the "burden" of holding a hearing certainly does not justify blinking at the blatant fraud by respondent's counsel found in this case.

* * * *

As the briefs of *amici* ably show, a defendant's statutory right of removal remains a vital check against unfair attempts to seek a "home-town" advantage. The Fifth Circuit's narrow fraudulent joinder standard, however, would allow plaintiffs to abrogate this right in bad faith, simply by joining a defendant against whom some cause of action might plausibly be stated. Given the proliferation of product liability claims and the broad sweep of state product liability statutes, the policies which motivated the establishment of diversity jurisdiction and the concomitant right of removal remain as vital and pressing today as they were when these features of federal jurisdiction were first contemplated under the Judiciary Act of 1789. The fraudulent joinder doctrine thereafter arose in the common law as a means of ensuring that diversity-destroying defendants are "properly joined" under the federal removal statute. The petition therefore presents a question which this Court is uniquely suited to resolve and one that also is of paramount importance to this country's manufacturing industries. For these additional reasons, review by this Court is warranted.

CONCLUSION

For the reasons set forth above and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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